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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-8

MEHENDRA R. MEHTA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Mehendra R. Mehta, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Order Below

The Order of the Court of Appeals is appended to this Petition as Appendix A.

Jurisdiction

The Order of the Court of Appeals (unpublished, per Seventh Circuit Rule 35) was entered on December 7, 1976. Petitioner's Petition for Rehearing and Suggestion for Rehearing in Banc, timely filed, was denied on May 31, 1977 (App. B). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 22.2 of the Rules of this Court.

Questions Presented

1. May 18 U.S.C. 1001 constitutionally be applied to acts of a lawyer in his role as advocate, or does such application unduly exert a chilling effect upon legal representation in violation of citizens' rights to advocacy?

2. Does application of 18 U.S.C. 1001 to a lawyer as an advocate in an administrative tribunal, where said statutory provision is inapplicable to a lawyer as an advocate in a judicial tribunal, violate due process?

3. May the government circumvent the requirements of *Brady v. Maryland* by affirmative failure to make and/or preserve witness statements?

4. Does *United States v. Costello* justify the government's purposeful presentation of hearsay before the grand jury through one agent and then purposeful failure to have said agent testify, where this deprives a defendant of his constitutional right of confrontation?

5. Did the Court of Appeals misapply *United States v. Agurs*, 427 U.S. 97, where it applied the "raises a reasonable doubt" test instead of the "might have affected outcome" test, where there had been a specific demand for the exculpatory evidence withheld?

6. Has a lawyer-defendant—forced to represent himself at post trial motions—been denied his right to counsel?

7. Was defendant prejudiced by the trial court's failure to make specific findings of fact and conclusions of law upon defendant's request as required by F.R.Cr.P. 23(c)?

8. Was defendant denied a fair trial by the trial court being prejudiced by an out-of-court encounter with defendant before decision?

Constitutional Provisions Involved

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall be . . . deprived of life, liberty or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutory Provisions Involved

18 U.S.C. 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years or both.

18 U.S.C. Rule 23(c)

Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

Statement Of The Case

Petitioner, Mehendra R. Mehta (hereinafter, defendant) was charged in a 10-count indictment (74 CR 415) with having violated 18 U.S.C. 1001. Defendant is an attorney. The charges are based upon alleged false statements contained in certain government forms containing misleading and vague instructions as to their completion, and letters submitted on behalf of aliens seeking permanent resident status in the United States. Jury having been waived, defendant was acquitted by the court on Counts 5, 6 and 8 and convicted on the remaining counts. He was sentenced to a year and a day on Counts 1, 2, 3 and 4, sentences to run concurrently. On Counts 7, 9, and 10, defendant was placed on 3 years probation, to be served consecutive to the sentence imposed on Counts 1, 2, 3 and 4. The indictment is set forth as Appendix C.

Statement Of Facts

The specific facts necessary to an understanding of the issues raised in this petition are fully set forth within the specific Points of the argument to which they are pertinent, and are not repeated herein to avoid unnecessary duplication.

In short, the facts are as follows:

Defendant, an attorney, had been retained by aliens seeking permanent resident status in this country. He stands convicted concerning allegedly false statements contained in certain forms submitted on behalf of said aliens. These statements are alleged to have been made in violation of 18 U.S.C. 1001.

Reasons For Granting The Writ

1.

18 U.S.C. 1001 is unconstitutional as applied to acts of a lawyer as an advocate.

18 U.S.C. 1001 is inapplicable to false statements made by lawyers acting as advocates in federal judicial proceedings. *United States v. D'Mato*, 507 F.2d 26 (2 Cir. 1974); *United States v. Erhardt*, 381 F.2d 173 (6 Cir. 1967); *Morgan v. United States*, 309 F.2d 237 (D.C. Cir. 1961). The Court of Appeals recognized that a lawyer *cannot* be guilty of violating 18 U.S.C. 1001, for acts done during "advocacy" in a *court of law*, but held that he *could* be guilty for acts done during "advocacy" in an *administrative hearing*, because a lawyer can be guilty—in a court—for statements "which pertain to 'action which essentially involves the' administrative or housekeeping functions, not the judicial machinery of the Court." (App. 6a) The opinion of the Court is illogical; for the statute is applicable to "housekeeping" functions because they do *not* involve a lawyer *as an advocate.*

The application of criminal sanctions upon lawyers, as advocates, for acts of advocacy—whether in courts of law or before administrative bodies—substantially diminishes citizens' rights to counsel. An attorney's task as an advocate is to present the facts as best he can for his client; if there is any area open to interpretation as to what is required by a given question, an advocate should be able to respond based on the interpretation of the question most appropriate to his client's interest. *State v. Zwillman*, 112 N.J. Super. 6, 270 A.2d 284 (1970). Lawyers will no longer act as advocates if the threat of prosecution under 18 U.S.C. 1001 is hanging over their heads.

This Court has often recognized that advocacy by lawyers has played a vital role in American democracy. *Anders v. California*, 386 U.S. 738 (1967); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972).[1]

Advocacy is vital, for it authorizes conduct not permitted by a person not proceeding as an advocate. *Re McConnell*, 370 U.S. 230 (1962); *Maness v. Meyers*, 419 U.S. 449 (1975).

As the right to advocacy is too vital to be chilled by threat of contempt (18 U.S.C. 401), so too this Court must prevent its destruction by threat of prosecution under 18 U.S.C. 1001.

Both due process and equal protection are violated by application of 18 U.S.C. 1001 to acts of advocacy by a lawyer in administrative proceedings, when the statute is not applicable to identical acts in judicial proceedings.

There is no valid distinction between a knowingly false statement by a lawyer before a court, and a knowingly false statement by a lawyer before an administrative agency. No distinction exists, because false statements in court can be prosecuted as perjury. To be the basis for perjury, a false statement must be under oath. It is not necessary that the statement be made under oath for a conviction under 18 U.S.C. 1001. A statute which treats acts, identical in substance, differently, based on an irrational distinction, *i.e.*, whether before a court or an administrative agency, is unconstitutional.

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[1] These cases involve the Sixth Amendment right to counsel in criminal proceedings. However, no distinction exists, for the right to the aid of counsel is recognized in the proceedings here involved, and legal aid in preparing forms (as here involved) is available to all citizens. See *NAACP v. Button*, 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964).

The difference in treatment is so disparate as to be wholly arbitrary and therefore in violation of due process of law and equal protection of the laws. See *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Schneider v. Rush*, 377 U.S. 163 (1964); *Loving v. Virginia*, 388 U.S. 1 (1967).

This Court should grant the Writ, to decide this crucial question concerning the right of citizens to advocacy by lawyers.

2.

The procedures used by the government in its investigation in the case at bar—whereby statements of witnesses to investigators either were not taken and transcribed, or were not transcribed until months after the fact or where the original notes were destroyed—operated to deprive defendant of due process of law, by thus depriving him of the opportunity for meaningful exercise of his right to utilize prior statements of prosecution witnesses as part and parcel of his right to cross-examination. In the current context of carte blanche for government-compelled discovery, a sense of decency and fair play requires, at the very least, that the government not render it impossible for a defendant to exercise his Sixth Amendment right to confrontation.

In *Wardius v. Oregon*, 412 U.S. 470, 474 (1973), this Court recognized that the system which pits the prosecution's pre-trial power to obtain evidence[2] against defen-

[2] See, *e.g.: Fisher v. United States*, 425 U.S. 391 (1976) (government can obtain, from defendant's attorney, items in the attorney's possession which were given to him by defendant to aid in preparing tax returns); *Couch v. United States*, 409 U.S. 322 (1973) (government can obtain records from defendant's accountant); *United States v. Miller*, 425 U.S. 435 (1976) (government can obtain defendant's bank records);

(Footnote continued on following page)

dant's limited preparation ability, contains inherent inequities. The *Brady* doctrine,[3] and the requirement that "3500" material be produced, have evolved for the purpose of seeking to neutralize this imbalance. But even more than this; these requirements also exist for the purpose of insuring basic fair play; to render the trial a search for truth. *United States v. Bryant*, 439 F.2d 642, 648 (D.C. Cir. 1971).

The existing inequities of the present legal system, whereby the government can discover virtually everything while the defendant can obtain virtually nothing, were unconscionably aggravated in the case at bar by the manner in which the government proceeded, so as to prevent defendant from having any possible benefit from the government's pre-trial witness interviews. This denied defendant due process and his constitutional right of confrontation.

* * *

The government effectively prevented defendant from having the use of any prior testimony before the grand jury of witnesses Vora, A. Dave, D. Dave, J. Patel, Mr.

[2] *continued*
United States v. Mara, 410 U.S. 19 (1973) (defendant can be compelled to give handwriting exemplars); *United States v. James*, 493 F.2d 323 (2d Cir. 1974) (prospective defendant can be called to testify before grand jury); *Kastigar v. United States*, 406 U.S. 441 (1972) (government can obtain evidence prior to trial and at trial by compelling witness to testify under limited grant of immunity). See also F.R.Cr.P. 12.1 (defendant can be compelled to advise government of any affirmative defenses and alibi witnesses prior to trial).

[3] *Brady v. Maryland*, 373 U.S. 83 (1963), embodying due process concepts.

[4] *I.e.*, material furnished pursuant to 18 U.S.C. 3500 ("Jencks Act"), a statute promulgated to remedy the problems which required reversal in *Jencks v. United States*, 353 U.S. 657 (1956).

Zeleniak, and Czarneci; this was accomplished because the government did not present these witnesses to the grand jury. Instead, the government presented only Agent White to the grand jury, and then did not call White as a witness at trial. This violated defendant's Sixth Amendment right of confrontation. Reliance by the Court of Appeals on *Costello v. United States*, 350 U.S. 359 (1956) and *United States v. Daras*, 462 F.2d 1361 (9 Cir. 1972), is improper. (App. 3a) For in *Costello* the persons who testified at the grand jury testified at trial, so that there, defendant's right to obtain their testimony as a tool to confront the other witnesses was not denied. *Daras* is invalid, for it wholly misinterprets *Costello.*

Defendant was further denied access to meaningful prior statements of the witnesses, because Agent White failed to make notes of his conversation with the witnesses until 4 to 6 months after his interviews with them, (Tr.H. 168-69), a deviation from White's usual and customary procedures. (Tr. 193-94)

Defendant was further denied prior statements of witnesses because other agents made no notes of conversations with witnesses, (Tr.H. 129, 134, 136-38, 143, 144, 148, 156-59), or destroyed their original notes of such conversations. (Tr.H. 113, 114)

The first and crucial interview with Vora was on March 13, 1974. He was interviewed by Agents White and Johnson. This interview lasted for several hours. (Tr.H. 137) No notes were taken (Tr.H. 135, 137), and no subsequent report was made. (Tr. 196)

Defendant was further denied statements, by the withholding of certain notes (Tr.H. 287, 291, 292, 295, 296, 306, 307), or by summaries being given with items deleted reflecting who was present at the interview and/or the date of the interview. (R. 46, pp. 45, 46, 48, Tr.H. 333)

The totality of the government's actions in proceeding in such a manner as to prevent retention of evidence, in the context of a criminal justice system wherein defendant himself is powerless to obtain evidence, violates due process.

The system which permits the government to compel discovery where defendant cannot, and at the same time permits the government to manipulate the retention of evidence (by not taking notes, and not presenting witnesses to the grand jury, so that defendant cannot obtain evidence), violates due process and his constitutional right of confrontation.

Recent opinions of the Ninth and District of Columbia Circuits have recognized the imbalance, finding no justifiable basis for government agents not to preserve original notes or suffer appropriate sanctions. *United States v. Harrison*, 524 F.2d 421 (D.C. Cir. 1975); *United States v. Harris*, 543 F.2d 1247 (9 Cir. 1976). The Seventh Circuit's decision at bar conflicts with these cases.

This Court should grant certiorari to consider whether due process is violated where the government's affirmative failure to preserve witnesses' statements violates due process.

3.

The opinion is founded upon a totally inaccurate view of the Department of Immigration's discretion in approving an alien for permanent residential status, and upon a misreading of *United States v. Agurs*, 427 U.S. 97.

The Court applied an erroneous test to determine whether defendant's constitutional rights were denied by a prosecutor's withholding of exculpatory evidence. The Court relied upon *United States v. Agurs*, 427 U.S. 97, 49 L.Ed.2d 342 (1976), holding that defendant does not have a right to a new trial unless the failure to disclose "is sufficiently significant to result in a denial of defendant's right to a fair trial." (App. 4a-5a) Application of the strict test of *Agurs* violates the holding of *Agurs* itself in a situation as here, where there *had* been a pretrial request for the type of material withheld.

In *Agurs*, this Court held that different standards apply in different situations, as follows: (1) the disclosure would demonstrate possible perjured testimony; Standard: reasonable likelihood . . . would have affected judgment; (2) there *was* a specific request; Standard: might have affected outcome; and (3) there is *no* specific request; Standard: it raises a reasonable doubt, *i.e.*, "sufficiently significant."

Here, a request *was* made and this involves a "corruption of the truth seeking process," *i.e.*, "the veracity of the prosecution witness" (49 L.Ed.2d 342, at 350), and hence standard No. 1, not No. 3, is applicable.

Prior to trial, defendant moved:

> "for an order compelling the attorney for the Government to disclose any promises, inducements, agreements of leniency or dismissals of prosecutions, or monetary inducements made to any Government witness or said witness' attorney or authorized agent which is directly or impliedly consideration for said Witness' testimony in the above captioned case." (R. 12)

In its Response to said motion, the government stated:

> "No promises, inducements, agreement of leniency, dismissals of prosecutions or monetary inducements have been made to any government witness or his attorney or agent as direct or implied consideration for said witness' testimony in the above-captioned case." (R. 15)

However, in its Response to defendant's post-trial motion, in answer to defendant's allegation that witnesses Vora and Dave were given undisclosed inducements in the form of an official decision not to deport them, the government admitted that a decision not to deport was made—but claimed that defendant knew of such before trial.

The government stated:

> "The defense certainly knew prior to trial . . . that the Government had no plans to deport either individual." (R. 62, p. 3)

This statement directly conflicts with the government's earlier position that no inducements had been made to either witness and that the witnesses were testifying "under the threat of deportation." (Tr. 78, 219-20)

The government's decision not to deport either individual is material possibly affecting the fact-finder's determination of the credibility of government witnesses which must be disclosed. *Mooney v. Holohan*, 294 U.S. 103 (1934); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. McCrane*, 527 F.2d 906 (3 Cir. 1975); *United States v. Harris*, 462 F.2d 1033 (9 Cir. 1972); *United States v. Kaplan*, 470 F.2d 100 (7 Cir. 1972).

Defense counsel has a right to examine a key prosecution witness as to the existence of any "deals" with the prosecution, whereby he expects to gain some advantage in exchange for his testimony. *Giglio v. United States*, *supra*; *DeMarco v. United States*, 415 U.S. 449 (1974); *Napue v. Illinois*, 360 U.S. 264 (1959). See *United States v. Guerts*, 53 F.R.D. 26 (E.D. Wis. 1971).

The prosecution caused the court to believe that the threat of deportation was hanging over each witness' head; not that a "deal" had been made, that the witness would not be deported. (Tr. 977) The situation is comparable to a witness testifying that no promise concerning prosecution had been made, where the witness knew that the government had in fact decided to drop criminal charges or to recommend probation.

The panel's opinion inaccurately assumes that once the Department of Labor has issued a labor certificate, permanent resident status follows automatically. The issue of Labor Certification is an administrative ruling decided by the U.S. Department of Labor, not by the Immigration Service. The determination involves such factors as job availability for American citizens, wages, minimum vocational requirements, including what is contained in the forms submitted by the applicants. *The immigration service has discretionary power to deny permanent resident status, whether or not a Labor Certification has issued. The immigration service could—and normally would—deny the grant of such permanent status to applicants like Dave and Vora, who admittedly have violated immigration laws.* (Tr. 60-70, 816-25)

The decision of the Immigration and Naturalization Department—the de facto prosecutorial agency—not to deport was an awarding of "prosecutorial leniency."

The government's determination not to deport either individual, made prior to their testimony, was an inducement for their testimony. It had to be disclosed, under *Agurs*, *supra*, for Vora and Dave were the government's crucial witnesses. If they were disbelieved, no conviction could be had. Due process was denied by the government's failure to disclose the full extent of its intentions toward these witnesses.

The court's refusal to hold a hearing as to inducements, (Tr.H. 6), together with its refusal to make the required findings of fact (see Point 5, *infra*), rendered any intelligent appellate determination impossible.

Certiorari should be allowed, to permit this Court to resolve the questions concerning *Agurs* posited by the Seventh Circuit's order.

4.

Defendant was denied assistance of counsel.

The opinion below fails to discuss the impropriety that defendant was forced to proceed in post-trial motions without counsel because his counsel *opposed* his position at the post-trial hearing. (Tr.H. 9-10, 14-15, Jan. 19, 1976; Tr.H. 263-65; Tr.H. 6, Dec. 4, 1975; Tr.H. 3, Dec. 18, 1975; Tr.H. 9, Jan. 19, 1976) A defendant's constitutional right to effective assistance of counsel, which applies to post-trial proceedings, is not diminished because defendant is a lawyer. *United States v. Hamilton*, 451 F.2d 1013 (2 Cir. 1971). There never was a waiver of his right to counsel. This cause must be remanded for a new post-trial proceeding to be conducted for defendant by competent counsel.

There were substantial hearings at post-trial motions relative to the government's withholding of evidence. Thus, these hearings were crucial stages of the proceedings to which the Sixth Amendment right to counsel applies.

5.

The trial court refused to make specific findings of fact and law as required by F.R.Cr.P. 23(c), and the Court of Appeals refused to rule on this issue. Defendant was prejudiced by the court's failure to make the required findings.

Title 18 U.S.C., Rule 23(c) requires a trial court to make specific findings in a bench trial. *United States v. Livingston*, 459 F.2d 797 (3 Cir. 1972). Defendant's post-conviction request for such specific findings was denied. Here, necessary for appellate review were both findings of facts and statements of controlling law. Compare *United States v. Sicilia*, 457 F.2d 787 (7 Cir. 1972).

In *Morrissey v. Brewer*, 407 U.S. 471 (1972), in regard to parole revocation hearings, this Court held that due process required "a written statement by the fact-finders as to the evidence relied on and the reasons for revoking parole." *Id.* at 489. Surely due process must require no less by a judge upon a finding of guilty. See also *King v. United States*, 492 F.2d 1337 (7 Cir. 1974).

It was essential that such findings and conclusions be entered, in light of the necessity for appellate review of other points raised in defendant's appeal[5] and to insure

[5] Among the Points raised in the appeal, for a proper determination of which, we submit, findings of fact and conclusions of law were necessary, were the following (numbered as in the original Brief):

8. The evidence is insufficient to sustain conviction on Counts 1 and 3 because the government failed to prove that the statements were literally untrue per *Bronston v. United States*, 409 U.S. 359 (1973), and *United States v. Lozano*, 511 F.2d 1 (7th Cir. 1975). There was evidence supporting defendant's theory that the statements forming the bases of Counts 1 and 3 were not "literally untrue". See Tr. 268, 280-81, 288-29, 293, 776, 804-05, 662-64, 302. See Def. Br. pp. 34-38.

(Footnote continued on following page)

that the court was not prejudiced by an out-of-court encounter with defendant and a government rebuttal witness (Rothman), who did not appear to testify. That the incident appeared most prejudicial to the trial court is demonstrated by the lengths with which he proceeded to explain his lack of prejudice. He "doth protest too much, methinks." (App. D)

Absent his specific finding of facts and conclusions of law, it is impossible for a reviewing court to evaluate his assertion of lack of prejudice.

Absent the trial court's findings of fact and conclusions of law as to the issues as above set forth in footnote 5, there could be no meaningful appellate review of those issues. Hence the trial court's refusal to make findings, and the Court of Appeals' failure even to rule on this issue, was prejudicial to defendant, and cannot be dismissed as mere "harmless error."

[5] *continued*

9. The evidence is insufficient to sustain conviction on Counts 7, 9 and 10 absent proof of falsity, upon the same theory as just set forth; see Tr. 375, 379, 983-84.

10. The government failed to prove that the alleged false statements were material. (A) the convictions upon Counts 1, 2, 3 and 4 must be vacated, where the result would have been the same had the statements not been made; (B) The proof fails to demonstrate that the alleged false statements were "material"; (C) There was no proof that the alleged statements had a general tendency to influence; (D) The government failed to prove materiality of the alleged false statements in Counts 2 and 4; (E) The government failed to prove the materiality of the alleged false statements in Counts 1 and 3.

11. The evidence is insufficient on Counts 1, 2, 3 and 4, where the government witnesses were not credible and were admitted liars.

6.

Due process was denied by the court being prejudiced by an encounter in an elevator with defendant and Mr. Rothman, a proposed government witness.

Judge Marshall, prior to decision, encountered defendant, his lawyer and Rothman, a proposed government witness, in an elevator. The court's statement concerning this incident is set out in Appendix D. The court's disclaimer of prejudice cannot remove the prejudicial effect of this incident. He is human and must surely have been prejudiced.[6] His prejudice is evident from his continued need to disclaim prejudice. Here, where prejudice is apparent and there is no specific finding of facts (see Point 5) sufficient to prove he was not prejudiced, the conviction violates due process.

Conclusion

For any or all of the foregoing reasons, a Writ of Certiorari should be issued to review the judgment of the Seventh Circuit.

Respectfully submitted,

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Chicago, Illinois 60601
Attorney for Petitioner

[6] "The disciplined judicial mind should not be subjected to any unnecessary strain; even the most austere intellect has a subconscious." *United States v. Walker*, 473 F.2d 136, 138 (D.C. Cir. 1972).

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Nos. 76-1100 and 76-1349
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MAHENDRA R. MEHTA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
75 CR 415—**Prentice H. Marshall**, *Judge.*

ARGUED SEPTEMBER 15, 1976—DECIDED DECEMBER 7, 1976

Before SPRECHER, and WOOD, JR., *Circuit Judges*, and GRANT, *Senior District Judge**

ORDER

Defendant-Appellant Mahendra R. Mehta was convicted on seven of ten counts of an indictment of making false statements to the government in violation of 18 U.S.C. § 1001. The indictment alleged that Mehta made

* Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

false statements to the United States Department of Labor and the Immigration and Naturalization Service on behalf of four aliens who were attempting to obtain permanent resident status in the United States.

After conviction in a bench trial before Judge Prentice H. Marshall of Counts 1, 2, 3, 4, 7, 9, and 10, Defendant-Appellant Mehta's trial counsel filed a post-trial motion for judgment of acquittal or a new trial. Prior to sentencing, Mehta filed several *pro se* motions for judgment of acquittal or a new trial. After conducting a hearing as to whether the government had produced all Section 3500 material, Judge Marshall found that the government had complied fully with 18 U.S.C. § 3500 and denied all of the defendant's post-trial motions. The defendant then retained new appellate counsel and brought this appeal. In his appellate brief, the defendant raises a host of alleged errors.

Misconduct by the Government:

The defendant stresses that the government has committed misconduct in that it precluded him from access to meaningful summaries of witnesses' pretrial statements, misled him as to the nature of promises made to governmental witnesses and failed to disclose exculpatory material about the defendant.

As regards the statements of witnesses before trial, the defendant alleges a deprivation of due process on the grounds that the government agents made no notes of some conversations and destroyed their original notes of others. Additionally, he contends that the government, by having Agent White testify to the Grand Jury, intentionally precluded the defense from acquiring prior testimony of the other witnesses.

The Supreme Court has rejected the argument that an indictment based on hearsay evidence is constitutionally invalid. *United States v. Costello*, 350 U.S. 359 (1956). We agree with the defendant that the presentation of hearsay evidence of an investigating officer in lieu of readily available testimony by direct witnesses is not a particularly desirable or a preferred procedure. However, in the absence of a showing that the integrity of the Grand Jury proceeding has been impaired, an indictment founded exclusively on such testimony is neither unconstitutional nor inherently wrong. *United States v. Cruz*, 478 F.2d 408, 411 (CA 5 1973). We find no such impairment in this case and are, therefore, unpersuaded by defendant's arguments in this regard.

Similarly, it was not error to refuse disclosure of the Grand Jury testimony of Agent White. The Jencks Act specifically provides that testimony of a Grand Jury witness is not available until after trial testimony has been completed. Since Agent White did not testify at trial, the government was not obliged to disclose his testimony. *United States v. Daras*, 462 F.2d 1361 (CA 9 1972), *cert. denied*, 409 U.S. 1046 (1972).

Defendant also maintains that his due process rights were violated by the manner in which the government interviewed and preserved statements. This court, however, has held that 18 U.S.C. § 3500 "does not require government agents to preserve their notes after they have been transcribed and their reports checked for accuracy." *United States v. Spatuzza*, 331 F.2d 214 (CA 7 1964); *United States v. Harris*, et al., Slip Opinion, No. 75-1360, et al., (CA 7 October 12, 1976), p. 6. Consequently, we find no reversible error in the government's preparation of the case.

Failure to Disclose Exculpatory Information

The defendant alleges that the government improperly failed to disclose exculpatory information by (1) improperly withholding promises to Messrs. Vora and Dave, and (2) not disclosing evidence demonstrating that the defendant had proceeded in an honest fashion in other immigration matters.

The Supreme Court has held that a prosecutor is under a duty to disclose exculpatory information about a criminal defendant. *Brady v. Maryland*, 373 U.S. 83 (1963). The court has construed this obligation to include both a duty to correct false testimony (*Napue v. Illinois*, 360 U.S. 264 (1959)) and a duty to reveal promises of prosecutorial leniency to government witnesses. *Giglio v. United States*, 405 U.S. 150 (1971). Most recently, the court held that a prosecutor does not violate his constitutional duty of disclosure unless his omission is sufficiently significant to result in the denial of the defendant's right to a fair trial. *United States v. Agurs*, 44 L.W. 5013 (1976). It is the character of the evidence and not the character of the prosecutor which results in constitutional error. *Id.* at 5017.

In the case at hand, Messrs. Dave and Vora testified for the government and were cross-examined about their immigration status. Subsequent to their dealings with the defendant, both of them petitioned the Department of Labor for labor certifications based upon their actual jobs. Those applications were approved and they became eligible to apply for permanent resident status. The approval of their requests was an administrative ruling upon the merits of their claims by the Department of Labor and not an awarding of prosecutorial leniency. The fact that the government processed their labor certificates cannot now be transformed into a nondisclosure of exculpatory information. Judge Marshall found that "in all respects these two witnesses were effectively cross-examined in regard to their immigration status". (P. Tr 8.) We find no sufficient grounds on which to overturn that finding.

The defendant also contends that the government was under a duty to disclose other immigration cases that the defendant handled honestly. The case cited by the defendant, *United States v. Shavin*, 287 F.2d 641 (1961), does not support this proposition. *Shavin* stands only for the proposition that the defendant has a right to introduce evidence of honest dealings in refuting allegations of fraudulent intent. Presumably, an indicted attorney is aware of other transactions he has handled. To read *Brady* as requiring a complete disclosure of a defendant's prior noncriminal behavior is both misplaced and fatuous.

Effective Assistance of Counsel

Defendant enumerates a multitude of factors that he contends amounted to a denial of "the minimum standard of professional representation" required by this court. *United States ex rel. Williams v. Twomey*, 510 F.2d 634 (CA 7 1975). This standard, while less stringent than the former "farce of mockery" standard, does not countenance or mandate a replay of trial strategy by way of hindsight. Judge Marshall concluded that the case was "well-tried". (Tr. 988-989.) None of the matters alluded to by the defendant either singly or cumulatively are so egregious as to indicate a lack of adequate representation of counsel.

Adequacy of the Post-Trial Hearing

The defendant complains that the trial court erred in not permitting an extensive evidentiary hearing on his post-trial motion, not requiring the production of Agent White's testimony, not inspecting notes made by the Assistant U. S. Attorney, denying a continuance of the post-trial hearing, and not excluding government attorneys at the hearing.

In reviewing the defendant's assignments of error, we find no constitutional deprivations or abuse of discretion on behalf of the trial judge. It is clear to this court that an extensive post-trial hearing was conducted and that the defendant was extended wide latitude in which to pursue possible sources of misconduct. He is not, however, entitled to a complete rehearing of the case. We find no substance to the defendant's claims about the hearing.

Constitutionality of the Application of 18 U.S.C. § 1001

Defendant avers that there is no legitimate distinction between knowingly false statements before a court (to which 18 U.S.C. § 1001 has been held inapplicable) and knowingly false statements before an administrative agency. Furthermore, he notes that government prosecutors are not subject to 18 U.S.C. § 1001.

Although we agree that the statute has not been extended to encompass statements by a lawyer during judicial proceedings (*United States v. D'Mato*, 507 F.2d 26 (CA 2 1974)), the courts have extended the statute to include statements to courts which pertain to "action which essentially involved the 'administrative' or 'housekeeping' functions, not the 'judicial' machinery of the court". *Morgan v. United States*, 309 F.2d 234, 237 (CA D.C. 1962), *cert. denied*, 377 U.S. 917 (1962). We find no unconstitutionality in the application of the statute to the defendant.

Allegation of Materiality in the Indictment

Conceding that the indictment did allege that the false statements were material, the defendant nevertheless insists that the indictment did not charge materiality with sufficient specificity. However, it is only necessary that an indictment allege materiality in substance and the indictment will be upheld if the facts alleged therein "warrant an inference that the false statement is material." *United States v. McGough*, 510 F.2d 598, 603 (CA 5 1975). We find no inadequacy in the indictment.

Sufficiency of the Evidence

Defendant questions the sufficiency of the evidence in a number of areas and petitions for a reversal of the conviction on this ground. Specifically he attacks the statements on the MA7-50B Forms for Vora and Dave, the future wage offer statements on Patel's 50B Form, the proof as to the materiality of the allegedly false statements and, lastly, the credibility of the government witnesses.

Rule 23(c) of the Federal Rules of Criminal Procedure mandates a court to make general findings of fact where a case is tried without a jury. Additionally, a judge must make special findings of fact if these are requested by a party.

Unlike its corresponding Civil Rule analogue (Rule 52(a)), Rule 23 does not state the effect which must be accorded to findings in a criminal bench trial. This circuit has distinguished between findings on the ultimate issue of guilt and findings on matters other than guilt. Where the record discloses "substantial evidence", a finding of guilt will not be overturned. *United States v. Owen*, 231 F.2d 831, 833 (CA 7 1956). Findings on matters other than guilt in a jury-waived criminal case will not be disturbed unless they are

"clearly erroneous". *United States v. Tallman*, 437 F.2d 1103, 1105 (CA 7 1971). Additionally, this court has made it clear that in reviewing bench trials it will "not function as a super-fact-finding tribunal". *Owen*, *supra*.

The record in this case is an extensive one and Judge Marshall obviously heard testimony from many sources. Judge Marshall made numerous findings of fact contrary to the claims made by the appellant. We are of the opinion that there is substantial and significant evidence on which Judge Marshall could predicate his findings and conclusions. The evidence was not insufficient and we find no grounds for reversible error.

Validity of the Jury Waiver

The defendant contends that he did not make a knowing and intelligent waiver of his right to a jury trial as required by the Supreme Court. *Johnson v. Zerbst*, 304 U.S. 458 (1938). A jury waiver is knowingly made when the defendant is aware of the right waived and the legal effect of electing a bench trial. It is not necessary that the defendant be able to foresee the entire panoply of evidence to be introduced or adduced at trial. There is no evidence that the defendant, a practicing attorney, was ignorant, induced or coerced by promises, incompetent or unappreciative of the gravity of the offenses. *United States v. Mitchell*, 427 F.2d 1280, 1282 (CA 3 1970).

For the reasons discussed above, the judgment and sentence of the district court should be and are hereby AFFIRMED.

APPENDIX B

AMENDED

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

May 31, 1977

Before

Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. ROBERT A. GRANT, Senior District Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

No. 76-1100 and 76-1349 (Consolidated)

MAHENDRA R. MEHTA,

Defendant-Appellant.

Appeal from the United States District Court, Northern District of Illinois, Eastern Division.
No. 75 CR 415
Prentice H. Marshall, Judge

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by Appellant Mehendra R. Mehta, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

v.

MAHENDRA R. MEHTA

No. _____
Violation: Title 18, United States Code, Section 1001

The JUNE 1975 GRAND JURY charges:

1. At all times herein relevant, the defendant, MAHENDRA R. MEHTA, was acting as an attorney for Jayendra P. Vora, an alien applying for permanent resident status in the United States.

2. At all times herein relevant, the United States Department of Labor and the Immigration and Naturalization Service were and are departments and agencies of the United States.

3. On or about March 13, 1973, at Chicago, in the Northern District of Illinois, Eastern Division,

MAHENDRA R. MEHTA,

defendant herein, wilfully and knowingly did make, and cause to be made, false, fictitious and fraudulent statements and representations as to material facts in a matter within the jurisdiction of the United States Department of Labor and the Immigration and

Naturalization Service, to wit: a "Job Offer for Alien Employment," Form MA7-50B, submitted on behalf of Jayendra P. Vora, signed by George Fried as manager (owner) of Michael T.V. & Radio Service, Chicago, Illinois, and dated March 13, 1973. The aforesaid false, fictitious, and fraudulent statements and representations as to material facts made in said Form MA7-50B were as follows:

(a) On line 8, the annual sales or income of Michael T.V. & Radio Service was listed as $75,000.00;

(b) On line 17, it was stated that George Fried learned that the alien was available for employment through personal contact with the alien; and

(c) On lines 28 and 29, it was stated that Mr. Vora would receive $4.25 per hour for 40 hours of work per week.

In violation of Title 18, United States Code, Section 1001.

COUNT TWO

The JUNE 1975 GRAND JURY further charges:

1. At all times herein relevant, the defendant, MAHENDRA R. MEHTA, was acting as an attorney for Jayendra P. Vora, an alien applying for permanent resident status in the United States.

2. At all times herein relevant, the United States Department of Labor and the Immigration and Naturalization Service were and are departments and agencies of the United States.

3. On or about March 6, 1973, at Chicago in the Northern District of Illinois, Eastern division,

defendant herein, wilfully and knowingly did make, and cause to be made, a false, fictitious and fraudulent statement and representation as to a material fact in a matter within the jurisdiction of the United States Department of Labor and the Immigration and Naturalization Service, to wit: a "Statement of Qualifications of Alien," Form MA7-50A, submitted on behalf of Jayendra P. Vora, and dated March 6, 1973. The aforesaid false, fictitious, and fraudulent statement and representation as to a material fact made in said Form MA7-50A was as follows: that during the period between June, 1968 and June, 1969, Mr. Vora's duties at Ambica Mills, Ltd, Baroda, India, included testing and calibrating the electrical instruments;

In violation of Title 18, United States Code, Section 1001.

COUNT THREE

The JUNE 1975 GRAND JURY further charges:

1. At all times herein relevant, the defendant, MAHENDRA R. MEHTA, was acting as an attorney for Arunkumar M. Dave, an alien applying for permanent resident status in the United States.

2. At all times herein relevant, the United States Department of Labor and the Immigration and Naturalization Service were and are departments and agencies of the United States.

3. On or about March 13, 1973, at Chicago, in the Northern District of Illinois, Eastern Division,

defendant herein, wilfully and knowingly did make, and cause to be made, false, fictitious, and fraudulent statements and representations as to material facts in a matter within the jurisdiction of the United States Department of Labor and the Immigration and Naturalization Service, to wit: a "Job Offer for Alien Employment," Form MA7-50B, submitted on behalf of Arunkumar M. Dave, signed by George Fried as manager (owner) of Michael T.V. & Radio Service, Chicago, Illinois, and dated March 13, 1973. The aforesaid false, fictitious, and fraudulent statements and representations as to material facts made in said Form MA7-50B were as follows:

(a) On line 8, the annual sales or income of Michael T.V. and Radio Service was listed at $75,000.00;

(b) On line 17, it was stated that George Fried learned that the alien was available for employment through personal contact with the alien; and

(c) On lines 28 and 29, it was stated that Mr. Dave would receive $4.25 per hour for 40 hours of work per week;

In violation of Title 18, United States Code, Section 1001.

COUNT FOUR

The JUNE 1975 GRAND JURY further charges:

1. At all times herein relevant, the defendant, MAHENDRA R. MEHTA, was acting as an attorney for Arunkumar M. Dave, an alien applying for permanent resident status in the United States.

2. At all times herein relevant, the United States Department of Labor and the Immigration and Naturalization Service were and are departments and agencies of the United States.

3. On or about March 3, 1973, at Chicago, in the Northern District of Illinois, Eastern Division,

MAHENDRA R. MEHTA,

defendant herein, wilfully and knowingly did make, and cause to be made, a false, fictitious and fraudulent statement and representation as to a material fact in a matter within the jurisdiction of the United States Department of Labor and the Immigration and Naturalization Service, to wit: a "Statement of Qualifications of Alien," Form MA7-50A, submitted on behalf of Arunkumar M. Dave, and dated March 3, 1973. The aforesaid false, fictitious, and fraudulent statement and representation as to a material fact made in said Form MA7-50A was as follows: that during the period between August, 1967 and February, 1972, Mr. Dave was an Electrical Technician at Kinarivala R.J.K. Industries, Behind Anil Starch Ahmedabad, India, and that his duties included testing and calibrating electrical instruments;

In violation of Title 18, United States Code, Section 1001.

COUNT FIVE

The JUNE 1975 GRAND JURY further charges:

1. At all times herein relevant, the defendant, MAHENDRA R. MEHTA, was acting as an attorney for Babubhai K. Amin, an alien applying for permanent resident status in the United States.

2. At all times herein relevant, the United States Department of Labor and the Immigration and Naturalization Service were and are departments and agencies of the United States.

3. On or about January 14, 1974, at Chicago, in the Northern District of Illinois, Eastern Division,

MAHENDRA R. MEHTA,

defendant herein, wilfully and knowingly did make, and cause to be made, a false, fictitious and fraudulent statement and representation as to a material fact in a matter within the jurisdiction of the United States Department of Labor and the Immigration and Naturalization Service, to wit: a "Statement of Qualifications of Alien," Form MA7-50A, submitted on behalf of Babubhai K. Amin, and dated January 14, 1974. The aforesaid false, fictitious, and fraudulent statement and representation as to a material fact made in said Form MA7-50A was as follows: that during the period from August, 1973, to January 14, 1974, Mr. Amin supervised other employees of Pfanstiethl Laboratories, Waukegan, Illinois, where he was employed;

In violation of Title 18, United States Code, Section 1001.

COUNT SIX

The JUNE 1975 GRAND JURY further charges:

On or about January 14, 1974, at Chicago, in the Northern District of Illinois, Eastern Division,

MAHENDRA R. MEHTA,

defendant herein, wilfully and knowingly did make, and cause to be made, a false, fictitious, and fraudulent

statement and representation as to a material fact in a matter within the jurisdiction of the United States Department of Labor and the Immigration and Naturalization Service, departments and agencies of the United States, in that he stated in a letter from himself to the Illinois State Employment Service, Alien Employment Certification Branch, Chicago, Illinois, dated January 14, 1974, that Pfanstiethl Laboratories, Waukegan, Illinois, was his client;

In violation of Title 18, United States Code, Section 1001.

COUNT SEVEN

The JUNE 1975 GRAND JURY further charges:

1. At all times herein relevant, the defendant, MAHENDRA R. MEHTA, was acting as an attorney for Jagdishbhai N. Patel, an alien applying for permanent resident status in the United States.

2. At all times herein relevant, the United States Department of Labor and the Immigration and Naturalization Service were and are departments and agencies of the United States.

3. On or about February 14, 1974, at Chicago, in the Northern District of Illinois, Eastern Division,

MAHENDRA R. MEHTA,

defendant herein, wilfully and knowingly did make, and cause to be made, a false, fictitious, and fraudulent statement and representation as to a material fact in a matter within the jurisdiction of the United States Department of Labor and the Immigration and Naturalization Service, to wit: a "Job Offer for Alien Employment," Form MA7-50B, on behalf of Jagdishbhai

N. Patel, signed by John Zeleniak as operation manager of Thybony Wall Coverings, Chicago, Illinois, and dated February 14, 1974. The aforesaid false, fictitious, and fraudulent statement and representation as to a material fact made in said Form MA7-50B was as follows: that on line 29, it was stated that Mr. Patel would be paid $5.50 per hour by Thybony Wall Coverings;

In violation of Title 18, United States Code, Section 1001.

COUNT EIGHT

The JUNE 1975 GRAND JURY further charges:

On or about February 20, 1974, at Chicago, in the Northern District of Illinois, Eastern Division,

MAHENDRA R. MEHTA,

defendant herein, wilfully and knowingly did make, and cause to be made, a false, fictitious, and fraudulent statement and representation as to a material fact in a matter within the jurisdiction of the United States Department of Labor and the Immigration and Naturalization Service, departments and agencies of the United States, in that he stated in a letter from himself to the Illinois State Employment Service, Alien Employment Certification Branch, Chicago, Illinois, dated February 20, 1974, that Thybony Wall Coverings, Chicago, Illinois, was his client;

In violation of Title 18, United States Code, Section 1001.

COUNT NINE

The JUNE 1975 GRAND JURY further charges:

1. At all times herein relevant, the defendant, MAHENDRA R. MEHTA, was acting as an attorney for

Jagdishbhai N. Patel, an alien applying for permanent resident status in the United States.

2. At all times herein relevant, the United States Department of Labor and the Immigration and Naturalization Service were and are departments and agencies of the United States.

3. On or about August 15, 1974, at Chicago, in the Northern District of Illinois, Eastern Division,

MAHENDRA R. MEHTA,

defendant herein, wilfully and knowingly did make, and cause to be made, a false, fictitious, and fraudulent statement and representation as to a material fact in a matter within the jurisdiction of the United States Department of Labor and the Immigration and Naturalization Service, to wit: a letter from John Zeleniak, operation manager, Thybony Wall Coverings, Chicago, Illinois, to William F. Browne, Acting Certifying Officer, United States Department of Labor, Manpower Administration, relating to Jagdishbhai N. Patel, and dated August 15, 1974. The aforesaid false, fictitious, and fraudulent statement and representation as to a material fact made in said letter was as follows: that Thybony Wall Coverings would pay Jagdishbhai N. Patel $6.30 per hour;

In violation of Title 18, United States Code, Section 1001.

COUNT TEN

The JUNE 1975 GRAND JURY further charges:

1. At all times herein relevant, the defendant, MAHENDRA R. MEHTA, was acting as an attorney for Jagdishbhai N. Patel, an alien applying for permanent resident status in the United States.

2. At all times herein relevant, the United States Department of Labor and the Immigration and Naturalization Service were and are departments and agencies of the United States.

3. On or about October 7, 1974, at Chicago, in the Northern District of Illinois, Eastern Division,

MAHENDRA R. MEHTA,

defendant herein, wilfully and knowingly did make, and cause to be made, a false, fictitious, and fraudulent statement and representation as to a material fact in a matter within the jurisdiction of the United States Department of Labor and the Immigration and Naturalization Service, to wit: a letter from John Zeleniak, operation manager, Thybony Wall Coverings, Chicago, Illinois, to William F. Browne, Acting Certifying officer, United States Department of Labor, Manpower Administration, relating to Jagdishbhai N. Patel, and dated October 7, 1974. The aforesaid false, fictitious, and fraudulent statement and representation as to a material fact made in said letter is as follows: that Thybony Wall Coverings would pay Jagdishbhai N. Patel $6.30 per hour;

In violation of Title 18, United States Code, Section 1001.

A TRUE BILL;

/s/ _____
FOREMAN

UNITED STATES ATTORNEY

SPH:ja

APPENDIX D

Before I get into the merits of the case, I want to make a statement regarding an incident which occurred on Thursday evening, as I was leaving the building.

After I got on the elevator to go downstairs I realized I was in a car with the defendant Mr. Mehta, Miss Kassam, another woman who had been in attendance throughout the trial, and who I assume is Mr. Mehta's wife, Mr. Frazin, Mr. Weiner and a sixth person.

I don't think Mr. Romanoff was there. If he was I missed him.

The sixth person, who is a man—I found that an awkward situation. I really don't know as I sit here now whether I was cognizant who was in the car when I got on it. I was in a hurry, and I came out the frosted doors and saw a car open and the red light down on, and I called to hold the car, and we all ended up together, and it was awkward.

The man who I did not recognize was saying something. I don't know what it was, because I truly didn't hear it. I was looking down at the floor, I think in sort of a response to the awkwardness of the situation.

I became aware of the fact that Mr. Mehta was sort of kicking the man, I am sure in an effort to get him to stop talking. He may have said something to the man, too, but if he did I did not hear it.

To dispel the awkwardness of the situation, I tried to strike up a conversation with Mr. Frazin with regard to a case that I understood he had recently tried with Judge Aspen of the State Court and which was videotaped.

The unidentified man kept talking, and Mr. Frazin, true to his calling, took charge of the situation and introduced the man to me, and me to the man.

The man was Mr. Rothman, the Government anticipated rebuttal witness. Mr. Rothman was immediately visibly shaken upon learning that I was the judge in the case in which he had failed to appear. He took his wallet out, displayed a card which he said were his credentials as a State Hearing Officer, and he beseeched me to believe him that he had been engaged in a hearing which prevented him from appearing at the trial.

I did not respond to his entreaties. I continued to engage Mr. Frazin in the conversation about the televised trial.

All of this took place in the time it takes an elevator car to descend from this floor, the 21st, down to the first floor.

When the car reached the main floor, I got out and headed for the building exit.

Mr. Rothman, who had continued to implore me to believe him as the car descended, ran along beside me displaying his State credentials and saying something to the effect that he would not want me to think ill of him should he ever appear before me.

Again, I did not respond to Mr. Rothman.

The following morning, my Clerk, Mr. Knox, advised me that Mr. Mehta was in the outer office and wanted to see me. Mr. Knox advised Mr. Mehta that I would not see him, but he came in to me to double check, and, of course, I declined to see Mr. Mehta.

The whole incident was a most unfortunate one.

However, I want to assure all concerned that I overheard and saw nothing in the car other than what I

have stated here, and that the incident has had no effect on my decision.

We tell jurors to put out of mind everything that they may see or hear about a case and its participants, other than that which they see and hear in the courtroom, and we should proceed upon the same assumption as far as judges are concerned. We assume that jurors abide by our instructions, and certainly we should expect no less of judges.

I want to turn, then, to the merits.

* * *

Mr. Frazin: One other thing, Judge: Your Honor has already discussed it. The matter of Rothman was as much a surprise to me as it was to you.

I hadn't seen that fellow before. The incident that happened Thursday was done without defense counsel's knowledge at all—Friday. And I hit the ceiling over one, because it was something that happened, and we were not consulted.

The Court: Now, I made the statement for the record so that everyone would know that I was cognizant of it. (Tr. 974-78)

Supreme Court, U. S.
FILED
OCT 27 1977
MICHAEL RODAK, JR., CLERK

No. 77-8

In the Supreme Court of the United States

OCTOBER TERM, 1977

MEHENDRA R. MEHTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

SHIRLEY BACCUS-LOBEL,
PATTY ELLEN MERKAMP,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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Rule 23(c), Fed. R. Crim. P. 10

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-8

MEHENDRA R. MEHTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1976. A petition for rehearing was denied on May 31, 1977 (Pet. App. B). The petition for a writ of certiorari was filed on June 30, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an attorney who willfully falsifies an application to the Department of Labor or the Immigration and Naturalization Service for a client's

labor certification may be convicted of making a false statement to a government department or agency, in violation of 18 U.S.C. 1001.

2. Whether the investigative procedures employed by the government in this case denied petitioner a fair trial.

3. Whether the government failed to disclose exculpatory material.

4. Whether petitioner, an attorney who was represented by retained counsel at trial and on appeal, was denied the effective assistance of counsel because he prosecuted his post-trial motions *pro se*.

5. Whether the district court made adequate findings of fact.

6. Whether petitioner was prejudiced by a chance, mid-trial meeting with the trial judge outside the courtroom.

STATEMENT

After a non-jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on seven counts of making false statements as to material facts in matters before the Department of Labor and the Immigration and Naturalization Service, in violation of 18 U.S.C. 1001. Petitioner was sentenced to concurrent terms of imprisonment for a year and a day on four counts. Imposition of sentence was suspended on the remaining three counts and petitioner received concurrent terms of three years' probation, the probationary term to commence upon completion of his sentence of incarceration. The court of appeals affirmed (Pet. 5; Pet. App. A).

Petitioner, a permanent resident alien, is an attorney in the State of Illinois whose practice consisted largely of immigration work. In particular, he assisted aliens in applying for labor certification and permanent resident status (Tr. 545-547). To qualify for labor certification, an alien must have a *bona fide* offer of a job in the United

States for which he or she will be compensated at the prevailing wage rate for the type of employment and for which no qualified American citizens are available (Tr. 486-512). See Section 212(a)(14) of the Immigration and Nationality Act of 1952, 66 Stat. 183, 8 U.S.C. 1182(a)(14).

The evidence showed that petitioner was retained by three aliens who desired to obtain permanent resident status. In return for payments well above his standard fee, petitioner agreed to handle their applications and to "create" the needed job offers.[1] For two of the aliens, Jazendra Vora and Arunkumar Dave, petitioner submitted labor certification forms to the Department of Labor which showed that they had job offers with Michael's T.V. & Radio Service in Chicago, Illinois, at the pay scale of $4.25 per hour for 40 hours a week. In fact, George Fried, the owner of the television store, had never met Vora or Dave and had never agreed to pay them $4.25 per hour or to employ them for 40 hours a week. Petitioner also falsely stated on the form that Vora and Dave had experience testing and calibrating electrical instruments and that the television store had annual sales of $75,000 (its annual sales actually had never exceeded $10,000). Vora, Dave, and Fried all signed the forms before the above information was recorded and did not supply petitioner with any of the false information. On the basis of these fictitious job offers, Vora and Dave received labor certifications from the Department of

---

[1]Petitioner would charge between $500 and $750 to represent an alien who had a *bona fide* job offer, but he would charge $2,500 to $3,500 if he had to "create" an offer (Tr. 30-34, 105-106). Immigration lawyers customarily charged between $800 and $1,200 for handling permanent resident applications based upon labor certifications (Tr. 797-798). Petitioner told one of the aliens, Jazendra Vora, that, although he could not legally charge him more than $750, he had to "pass money" to get information from the Department of Labor and thus would charge him $3,500 (Tr. 34-35).

Labor. Petitioner then filed applications for permanent resident status on their behalf with the Immigration and Naturalization Service (Tr. 30-44, 84-201, 261-279).

Petitioner was also retained by Jagdishbhai Patel after Patel's application for labor certification had been denied and he had been ordered to leave the country. Although Patel had a job paying $3.75 per hour, petitioner filed a labor certification form falsely stating that Patel's pay was $5.50 per hour. Patel's employer agreed to sign these forms only after petitioner told him that the pay rate referred to future wages rather than present salary and that "everybody does it." Labor certification nevertheless was denied because $5.50 was below the prevailing hourly wage rate of $6.28 for the specified job. Petitioner then prepared and submitted two letters to the Department of Labor from Patel's employer, falsely stating that Patel's salary had been increased to $6.30 per hour. Patel was granted labor certification shortly thereafter (Tr. 305-358).

ARGUMENT

1. Petitioner contends (Pet. 6-8) that 18 U.S.C. 1001 is unconstitutional as applied to the facts of this case. Relying on cases holding that 18 U.S.C. 1001 is inapplicable to false statements made by lawyers acting as advocates in federal judicial proceedings,[2] petitioner

[2]The cases cited by petitioner to support his proposition that 18 U.S.C. 1001 does not apply to false statements by attorneys in judicial proceedings are not in point. In *United States* v. *D'Amato*, 507 F. 2d 26 (C.A. 2), the court of appeals held that Section 1001 does not prohibit a party in a civil suit from filing a false affidavit that defrauds the other party but not the government. *United States* v. *Erhardt*, 381 F. 2d 173 (C.A. 6), involved the introduction of false documents into evidence by a defendant in a criminal proceeding, conduct that the court of appeals held was not within the intended scope of the statute and that was covered, if at all, by 18 U.S.C. 1621. *Morgan* v. *United States*, 309 F. 2d 234 (C.A. D.C), certiorari denied, 373 U.S. 917, most closely resembles the present case. In *Morgan*, the defendant was convicted of falsely stating, in documents submitted to a court, that he was an attorney and a member of the District of Columbia Bar while representing several clients in criminal proceedings. The court of appeals held that these statements were "administrative," rather than "judicial," in nature and were prohibited by 18 U.S.C. 1001.

argues that principles of due process and equal protection require that Section 1001 also not apply to statements made by lawyers acting as advocates in administrative hearings. Regardless of the merits of this equal protection claim, petitioner plainly was not acting as an advocate in an administrative hearing when he fabricated material information in an effort to obtain labor certification for his alien clients. The purpose of Section 1001 is to protect the government against those who would cheat and mislead it in the administration of its programs. *United States* v. *Gilliland*, 312 U.S. 86, 93. By submitting knowingly false applications, petitioner defrauded the government into issuing labor certifications to unqualified aliens (who paid petitioner exorbitant fees) and engaged in the very conduct that the statute was designed to prevent. Moreover, petitioner's statements were to an administrative agency in a non-adversarial setting, rather than in his capacity as a lawyer during a judicial or quasi-judicial proceeding. See *Morgan* v. *United States*, 309 F. 2d 234, 237 (C.A. D.C.), certiorari denied, 373 U.S. 917.

2. Petitioner contends (Pet. 8-11) that the government deprived him of his right to meaningful cross-examination by not presenting certain witnesses to the grand jury, not taking notes of some witness interviews, and destroying the original notes taken at other interviews. The court of appeals correctly rejected these claims. The purpose of a criminal investigation is not to assemble evidence for the defendant to use on cross-examination. The procedures employed by the government were fully consistent with constitutional and statutory requirements.

a. The government presented to the grand jury a federal agent who testified regarding the contents of the statements of different witnesses, all of which were turned over to petitioner. The agent also advised the grand jury

of the hearsay nature of his testimony. Petitioner's claim that this procedure violated his rights is foreclosed by *Costello* v. *United States*, 350 U.S. 359, where this Court upheld the validity of an indictment based exclusively on hearsay testimony. In *Costello*, the government called 144 witnesses at trial, only three of whom had testified previously before the grand jury. As in this case, the three witnesses were government agents who had summarized the evidence against the defendant. See also *United States* v. *Cruz*, 478 F. 2d 408, 411-412 (C.A. 5), certiorari denied *sub nom. Aleman* v. *United States*, 414 U.S. 910.

b. Petitioner also was not prejudiced by the manner in which the government interviewed prospective witnesses. Most interviews were stenographically recorded, and petitioner was provided with a copy of the witnesses' statements. Government agents or attorneys also spoke to these witnesses on other occasions, at times taking no notes or waiting several months to make a report. In some instances rough interview notes were destroyed after information was incorporated into reports. These reports were turned over to petitioner (Tr. 129, 136, 144, 156, 168-169, 184, 264-265, 350-355). Petitioner cites no authority that obliges an investigator to take notes at each interview.

Although, as petitioner points out (Pet. 11), the courts of appeals have taken divergent views on the producibility of rough interview notes of government agents (compare *United States* v. *Harris*, 543 F. 2d 1247 (C.A. 9), and *United States* v. *Harrison*, 524 F. 2d 421 (C.A. D.C.) with *United States* v. *Mase*, 556 F. 2d 671, 676 (C.A. 2), *United States* v. *McCallie*, 554 F. 2d 770, 773 (C.A. 6), and the cases cited in *Harrison, supra*, 524 F. 2d at 430, n. 25), this is not an appropriate case in which to resolve the issue.[3] Petitioner has not suggested any plausible reason

[3]We are unaware of any case in which the good faith destruction of rough interview notes in acordance with standard agency practice has led to the reversal of a conviction. In our view, interview notes are not producible under the Jencks Act unless they are "signed or otherwise adopted or approved" by the witness or are a substantially verbatim report of the interview. See 18 U.S.C. 3500(e) (1) and (2); *Goldberg* v. *United States*, 425 U.S. 94, 110-111, n. 19. In any event, this issue is of little continuing importance because the Federal Bureau of Investigation and the Internal Revenue Service, the government agencies most affected by the issue, have recently changed their internal procedures to require retention of the rough interview notes of their agents. See *United States* v. *Harris*, 560 F. 2d 148, 149 (C.A. 3), pending on petition for a writ of certiorari, No. 77-5149; *United States* v. *Dupree*, 553 F. 2d 1189, 1191 and n. 1 (C.A. 8), pending on petition for a writ of certiorari, No. 77-5059.

to believe that he was prejudiced by the good faith, routine destruction of the rough notes. The information in the notes was incorporated into reports that he did receive, and there is no evidence indicating that these reports were not complete and accurate. Furthermore, petitioner received extensive Jencks Act (18 U.S.C. 3500) materials from the prosecution to be used in cross-examining government witnesses. Finally, the evidence against petitioner was overwhelming. In these circumstances, "no substantial rights of [petitioner] have been affected by the destruction of the rough notes * * *." *United States* v. *Harris, supra*, 543 F. 2d at 1253.[4]

3. In response to petitioner's motion for disclosure of any promises of leniency to government witnesses, the prosecution stated that no such promises or inducements had been made. Petitioner contends (Pet. 12-15) that the fact that Vora and Dave were not deported shows that they had been granted prosecutorial leniency, the nondisclosure of which deprived him of a fair trial. See *United States* v. *Agurs*, 427 U.S. 97. However, petitioner was aware that, after his fraud had been discovered, Vora

[4]This Court has recently declined to review two cases raising the issue of the producibility of rough interview notes. *United States* v. *Fulle*, 544 F. 2d 519 (C.A. 7), certiorari denied, No. 76-992, May 31, 1977; *United States* v. *Harris*, 542 F. 2d 1283, 1292-1293 (C.A. 7), certiorari denied *sub nom. Clay* v. *United States*, 430 U.S. 934.

and Dave applied for and received valid labor certifications on the basis of jobs at which they were actually working and that they were in the process of seeking permanent resident status. Hence, the fact that the government did not deport the aliens does not indicate that undisclosed promises of leniency had been made to the two witnesses in exchange for their testimony. As the court of appeals noted (Pet. App. 4a-5a):

> [Their] applications [for labor certifications] were approved and they became eligible to apply for permanent resident status. The approval of their requests was an administrative ruling upon the merits of their claims by the Department of Labor and not an awarding of prosecutorial leniency. The fact that the government processed their labor certificates cannot now be transformed into a nondisclosure of exculpatory information.

In addition, the trial judge, who was the finder of fact in this case, stated that defense counsel had thoroughly explored Vora and Dave's immigration status, that counsel had pointed out that "the pressures were great on the government's witnesses to testify in support of the government's theory" (Tr. 977), and that Vora and Dave "were effectively cross-examined in regard to their immigration status" (H. Tr. 8).[5] Accordingly, the district court correctly held that petitioner's unsubstantiated allegations of prosecutorial misconduct "do not constitute facts entitling [him] to a new trial" (*ibid.*).

4. Petitioner, who was represented by retained counsel at trial and on appeal, asserts (Pet. 15) that he was denied the effective assistance of counsel on his post-trial motions because his trial counsel disagreed with his contention that the government had withheld Jencks Act

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[5]"H. Tr." refers to the transcript of proceedings on petitioner's motion for a new trial.

material.[6] Petitioner, an attorney, therefore chose to argue the motions *pro se*. This did not deprive petitioner of his right to counsel, since the Sixth Amendment does not require a trial attorney to prosecute a frivolous motion for a new trial. Cf. *Cardarella* v. *United States*, 375 F. 2d 222, 230 (C.A. 8), certiorari denied, 389 U.S. 882. Moreover, petitioner could have retained other counsel to represent him at the hearings on his post-trial motions, but decided instead to proceed without counsel at that stage of the proceedings. Finally, his trial attorney had no obligation to remain silent at the post-trial hearing, since his testimony about the scope of discovery did not involve any confidential communications protected by the attorney-client privilege.

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[6]At the hearing on the post-trial motion, petitioner's trial attorney testified (H. Tr. 263-265):

> There was, in my opinion, a full turnover of all documents, frankly, your Honor.
>
> In the years that I have been trying cases in this building I have never received as many documents, as often as I received them from Mr. Handler and Mr. Monico. * * *
>
> From time to time, Mr. Handler would send me material. I would send him material. I had the names of all of his witnesses, and if I needed to know where they lived, I got that. I gave him the names and addresses of all of our witnesses. If I needed information, all I had to do was call him.
>
> Now, furthermore, I issued, oh, 20, 30 subpoenas for documentary evidence. Material that I had trouble getting from Government agencies, Handler got for me.
>
> Sometimes he had trouble getting it and he pulled whatever strings he had to get it for us.
>
> When our subpoenaed material came in, I shared that with Mr. Handler.
>
> This is in the interest of seeing that justice is done to both sides. It allows a search for the truth in the courtroom.
>
> I have no reason to believe personally - I don't know what Mr. Mehta's feeling is, Judge, but I will give my feeling: I have no reason to believe or to suspect that any document or scintilla of

5. Although petitioner failed to make a timely motion requesting specific findings of fact (see Rule 23(c), Fed. R. Crim. P.), he claims (Pet. 16-17) that the district court failed to make findings adequate for a proper appellate determination of his case. However, the court of appeals observed no such deficiencies in the record and had little trouble in concluding that the trial judge's findings were supported by the evidence (Pet. App. 7a-8a). The district court expressly found that Vora and Dave were unqualified to work, and did not want to work, at Michael's T.V. & Radio Service, that the annual income of the television store did not approach $75,000, that the store was incapable of hiring Vora and Dave at the alleged wage rate, and that the store owner had not agreed to hire the aliens prior to signing their labor certification applications. The court also found that "the three statements regarding the wages to be paid to Patel were false." Finally, the court found that petitioner had knowledge of all of the above facts (Tr. 979-989).

6. Petitioner's final claim (Pet. 18) is that he was prejudiced by a brief, unintended meeting in a courthouse elevator among the trial judge, a prospective (but in fact unused) government rebuttal witness, and himself. Petitioner did not raise this issue in the court of appeals, and "[o]nly in exceptional cases will this Court review a question not raised in the court below." *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16. See also *United States* v. *Lovasco*, No. 75-1844, decided June 9, 1977, slip op. 5, n. 7. There are no exceptional circumstances here: petitioner does not specify in what manner the encounter might have been prejudicial to him, and the trial judge, after summarizing the episode, remarked that "the incident has had no effect on my decision" (Pet. App.

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information that we were entitled to under [18 U.S.C.] 3500 was withheld at all.

On the contrary, more material was given than is normal in any case I have ever tried in this District.

22a). Petitioner offers no basis to disturb that determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 77-8

MEHENDRA R. MEHTA,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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IN THE

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OCTOBER TERM, 1977

No. 77-8

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vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

STATEMENT

As the government's Brief in opposition misstates the facts, we are constrained to reply as follows:

As to Dave and Vora

The government strongly relies upon the testimony of Vora and Dave. Vora admitted on cross-examination that

he lies often and "when it helps me". (Tr. 61-71, 945) Dave also was thoroughly impeached. (Tr. 243, 810-18, 822-27)

Similarly, the government asserts that the $75,000 figure was a total fabrication instead of a projection, and that the job offer was fictitious. This is not true.

Mr. Fried testified that he could pay each alien that rate because their presence would enable him to handle additional business which he could not otherwise handle. (Tr. 268, 280-81, 288-91, 293) Fried testified that it was possible that with good help he could gross $75,000. (Tr. 302) If Fried could obtain sufficient business for either alien to work 40 hours a week at the average charge of $28 per hour (See Appendix A) for instrument repair, he could produce billing of $58,240 per additional employee over the course of a year. Their work would also support a substantial gross income in sales of parts for such repairs. The estimate of $75,000, therefore, is by no means untrue. The figure was an estimate (Tr. 662-64) by defendant based on conversations with Fried. (Tr. 662-64)

The form MA-750B does not specify whether what is desired is actual income or projected income. (Tr. 804) Nor do the guidelines so indicate. No entry for annual sales or income is required if the employer is an educational institution, hospital, church, non-profit organization, private household, or other non-business establishment. Income does not appear to be of great importance. The form is sufficiently ambiguous that "one could put in a projected figure in logical answer to that question."*

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* Testimony of Ralph Schelly, attorney, specializing in immigration work, and Second Vice-President of Chicago Association of Immigration and Nationality Lawyers. (Tr. 802-04)

Although at trial Fried testified that he had never seen Dave or Vora until after signing the certificates, he gave prior inconsistent statements to federal agents. (See D1 and D2, 3500 statements tendered to defendant prior to trial, Apps. B & B1)

As to Patel

None of the documents states that the figure is what Mr. Patel is *presently* being paid; instead, all are offers of what the company *would pay* when he *would* become absorbed in a permanent position, which could *only* occur upon his becoming a permanent resident. (Tr. 369, 391, 392) (See Defendant's Exhibit 61, App. C) The process of applying for permanent status could take more than one year. (Tr. 785). Thus, the future higher wages, as stated in the allegedly false statements, would represent a legitimate raise, considering the probable passage of time, and keeping in mind standard raises based on rising inflation and cost-of-living increases.

Officer Vraa of the Immigration Service admitted that a person must be receiving the offered amount at the time he becomes a permanent resident. (Tr. 498) Since it takes more than a year to process an application, (Tr. 785), it can be expected the present salary will differ from a future job offer. Evidence demonstrates that the job offer was an offer that the company would pay that salary to Mr. Patel at some time in the future. Mr. Zeleniak testified that it *was* a true job offer:

"Q. Okay, now, that was in fact a true offer.
A. Yes sir, it was. (Tr. 375)
. . .
Q. And this, too, was a lie.

A. What was a lie sir?
Q. The wage offer of 6.30.
A. No, sir." (Tr. 379)

The trial court himself noted that Zeleniak testified, ". . . that the 6.30 wage offer was not a lie." (Tr. 983-84)

The assertion of excessive fees is inappropriate. The fee quoted by defendant was not merely to proceed with the normal application processing, for which others charged $1,500, (Tr. 797), but included, if necessary, multiple filings and any and all appeals to the Immigration Board of Appeals. (Tr. 550-55)

ARGUMENT

1.

18 U.S.C. 1001 is unconstitutional as applied to acts of lawyer as an advocate.

The government asserts that defendant was not proceeding as an advocate for a client in an adversarial setting, but merely before an administrative agency; and hence, goes the argument, under the authority of *Morgan* v. *United States,* 309 F.2d 234, 237 (D.C. Cir. 1961), 18 U.S.C. 1001 is applicable.

Morgan v. *United States* is totally distinguishable. There, defendant was *not a lawyer*. He was charged with *impersonating* a lawyer. 18 U.S.C. 1001 was applied to him in regard to his "concealing his name, identity and non-admission to the bar." *Id.* at 235. This was the housekeeping function considered by the court.

That is totally different from *this* situation, where assertions are made to the Department of Labor and the Immigration Service, which *do* investigate, question applicants and hold hearings as to the propriety of granting resident status.

It is difficult to conceive how the government can assert defendant was *not* proceeding as an advocate when the counts of the indictment for which defendant was convicted read "at all times herein relevant the defendant Mehendra Mehta was acting as an attorney for". See Counts 1, 2, 3, 4, 7, 9 and 10, Appendix C of the Petition for Certiorari. The government's proof demonstrated that all acts of defendant were as an attorney for his alien clients.

He, in using vague and complicated forms,[1] acted as an advocate for his clients to the best of his abilities without any criminal intent.

Defendant was here proceeding as an advocate, and hence 18 U.S.C. 1001 is unconstitutional as applied.

2.

The government's tactics seek to circumvent basic Sixth Amendment and due process rights.

The evidence in this record demonstrates a purposeful and deceitful attempt by the government to prevent defendant from having witnesses' prior statements. (See Petition, pp. 10-11) The government seeks to avoid this by referring to *United States* v. *Costello*, 350 U.S. 359, and *United States* v. *Cruz*, 478 F.2d 408, and by asserting that defendant has no right to preservation of statements of witnesses made to government agents. *Costello* and *Cruz* are distinguishable. *Costello* may approve hearsay testimony before the grand jury for indictment purposes, but it certainly does not abridge the Sixth Amendment right of confrontation.

In *Costello* and *Cruz*, the agents who testified before the grand jury *were* called as government witnesses at trial. Their grand jury testimony was available to defendant.

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[1] The form MA7-50B, approved by the Department of Labor, Appendix D, is incomplete and vague in its nature and without proper guidelines, and is capable of various interpretations. There are no guidelines so far as Items 8 and 17 are concerned. In case of non-profit organizations, no income is required to be mentioned. The form and directions are vague as to whether the income should be actual income or projected income based upon business generated by those employees.

Here *only* Agent White testified at the grand jury. To avoid impeachment and to prevent defendant from having the use and benefit of his prior statement, (incorporating the other witness' statements), the government did not call him as a trial witness.

Nor in *Costello* and *Cruz* was there the practice, as here, of not taking notes when interviewing witnesses, recording conversations from memory only 4 to 6 months later, or destroying original notes from which discoverable material is prepared. The accumulated acts of the government in preventing defendant from obtaining meaningful statements of witnesses violates due process as well as the confrontation clause of the Sixth Amendment.

Nor is there validity to the government's assertions that certiorari should not be granted because two of many federal agencies have altered otherwise unconstitutional practices. (G. Br. pp. 6-7, fn. 3)

Here, Agent White testified before the Grand Jury in essence from his memory. Notes of witness' statements were recorded 4 to 6 months after the conversation. His testimony before the grand jury was a recording of their statements.

There is no indication that the Court of Appeals read the grand jury testimony of Agent White to determine whether it contains exculpatory evidence Nor did the trial court read it with an open mind. He first refused to order its transcription or production, or to have it made part of the record (Tr. H. 356), and only thereafter indicated he had read it. (R. 9) The distinction between "3500" material and material producible under *Brady* due to possible exculpatory matter is a real one indeed.

Under the principles of *Brady* v. *Maryland,* 373 U.S. 83, and *Wardius* v. *Oregon,* 412 U.S. 470, White's grand jury testimony had to be presented to defendant, so that he could determine its usefulness in trial preparation and cross-examination. *Dennis* v. *United States,* 384 U.S. 855; *DeMarco* v. *United States,* 415 U.S. 449.

Certiorari must therefore be granted, to decide whether the government violated due process by purposefully having prevented defendant from obtaining prior statements, thereby preventing effective confrontation of witnesses.

3.

The government's position is founded upon a totally inaccurate view of the Department of Immigration's discretion in approving an alien for permanent residential status.

Respondent misstates petitioner's position, misstates the record, and misleads this Court as to the nature of the procedures of the Immigration and Naturalization Department concerning granting permanent resident status.

Petitioner's complaint is not (as asserted by respondent, pp. 7-8) that Dave and Vora were not deported. Petitioner's complaint is that prior to trial, petitioner asked if there were any promises or inducements or agreements of leniency (R. 12) and was told *no* (R. 15), when in truth the government had decided not to deport. (R. 62, p. 3)

Nor can respondent rely upon the Court of Appeals' erroneous assertion that the decision not to deport Dave and Vora was merely an administrative decision of the Department of Labor, and not an act of leniency in exchange for testimony. The panel's opinion inaccurately assumes that once the Department of Labor has issued a labor

certificate, permanent resident status follows automatically. The issue of Labor Certification is an administrative ruling decided by the U.S. Department of Labor, not by the Immigration Service. The determination involves such factors as job availability for American citizens, wages, minimum vocational requirements, including what is contained in the forms by the applicants. The Immigration Service has discretionary power to deny permanent resident status, whether or not a Labor Certification has issued. The Immigration Service could—and normally would—deny the grant of such permanent status to applicants like Dave and Vora, who have violated immigration laws. (Tr. 60-70, 816-25)[2, 3]

There was no material before the Court of Appeals to dispute what is commonly known: the Immigration Service, not the Department of Labor, makes the decision on deportation. Absent proper material in the Court of Appeals, this matter must be remanded to the trial court for an evidentiary hearing. *DeMarco* v. *United States,* 415 U.S. 449.

The decision of the Immigration and Naturalization Department—the de facto prosecutorial agency—not to deport was an awarding of "prosecutorial leniency."

The prosecution caused the court to believe that the threat of deportation was hanging over each witness' head; not that a "deal" had been made, that the witness would not be deported. (Tr. 977) The situation is comparable to a witness testifying that no promise concerning prosecution had

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[2] Here, both Dave and Vora had violated provisions of the Immigration Service law by accepting employment without permission, thereby remaining in illegal status. (Tr. 60-70, 816-825)

[3] See Appendix E, Decision to Deport an Alien, and to violations of the law similar to those of Vora and Dave.

been made, where the witness knew that the government had in fact decided to drop criminal charges or to recommend probation. This deception violates due process. *DeMarco* v. *United States*, 415 U.S. 449 (1974); *Napue* v. *Illinois*, 360 U.S. 264 (1959). See *United States* v. *Guerts*, 53 F.R.D. 26 (E.D. Wis. 1971) and *United States* v. *Agurs*, 427 U.S. 97 (1977).

Certiorari must therefore be granted.

4.

Defendant was denied assistance of counsel.

Respondent's reliance on defense counsel's self-serving statement[4] to the court cannot alter the situation that petitioner was forced to proceed with lengthy post-trial motions without counsel. Petitioner, although a lawyer, was trained in India. He had a right to effective counsel. *United States* v. *Harrison*, 451 F.2d 1013 (2 Cir. 1971). He, the defendant, both under pressure and not trained or experienced in federal criminal matters, could not render to himself effective counsel as required by the Sixth Amendment to the United States Constitution. And he had the right to have his lawyer be an advocate for him. *Anders* v. *California*, 386 U.S. 738.

Here, where petitioner had no counsel in a post-trial motion in order to demonstrate the failure to produce all relevant material and the errors at trial, neither the Court of Appeals nor this Court can assess the amount of prejudice to petitioner in not having counsel. Pursuant to *Glasser* v. *United States*, 315 U.S. 60 (1942), certiorari must be granted and this cause reversed for an evidentiary hearing.

5.

The findings referred to by the government are insufficient to satisfy the requirements of specific findings of facts and conclusions of law.

The findings relied upon by the government do not satisfy Rule 23(c) for they fail to set out sufficiently specific facts and conclusions of law necessary for appropriate appellate review. Here involved were alleged false statements on very vague forms. For consideration was the problem whether the alleged false responses were not literally untrue, see *Bronston* v. *United States*, 409 U.S. 359 (1973); *United States* v. *Lozano*, 511 F.2d 1 (7 Cir. 1975), and whether defendant was proceeding as an advocate.

"Here, [d]etailed legal conclusions are, of course appropriate . . . [because] the facts . . . suggest several legal principles which the trial judge might have invoked." *United States* v. *Livingston*, 459 F.2d 797 (3 Cir. 1972). See *United States* v. *Sicilia*, 457 F.2d 787 (2 Cir. 1972).

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4 Trial counsel's response, relied upon by the government, (Gov. B. p. 9), merely demonstrates that he did not believe he was incompetent for not requesting further materials in pre-trial motions. Other materials were in existence and not given to defendant at the post-trial motion because the government was able to assert waiver by counsel. (Tr. H. 303, Tr. 340) The court also stated that other matters might have been withheld, but held that no proper proof was made by defendant, appearing pro se. (Tr. H. 352) The court would not permit defendant to proceed to determine whether there had been material withheld in violation of the principles of *Brady* v. *Maryland*, 373 U.S. 83 (1963). (Tr. H. 6)

The court did not permit defendant to obtain various applications of Vora and Dave filed with the Immigration Service. These contained statements appropriate for impeachment purposes. (Tr. H. 231-33. See App. F)

6.

This Court has jurisdiction to consider the prejudice to defendant caused by the trial judge's encounter with a government rebuttal witness out of the courtroom.

This Court has the power to notice fundamental error appearing on the record. *Silber* v. *United States,* 370 U.S. 717, 8 L.Ed.2d 798; *United States* v. *Atkinson,* 297 U.S. 157 (1936); and *United States* v. *Vaughan,* 443 F.2d 92 (2 Cir. 1971).

In *Vaughan,* in analyzing the applicable plain error rule, the court stated:

> "It is not a miscarriage of justice to convict a guilty man but if he is convicted in a way inconsistent with the fairness and integrity of judicial proceedings, then the courts should invoke the plain error rule in order to protect their own public reputation."

There, the plain error rule was applied to a situation where the trial court, sitting without a jury, was prejudiced by evidence outside the record. See also *United States* v. *Walls,* 443 F.2d 1220 (6 Cir. 1971).

So too, it would appear, at bar.

Here, the judge was present on an elevator when an uncalled government witness, Rothman, who was not called because he failed to appear on time, commenced a conversation. The court saw defendant attempt to stop that conversation by kicking the witness. The witness, when realizing the judge was present, then pursued the judge out of the elevator.

The prejudice to defendant from this incident becomes clear by considering the importance of this witness both to the prosecution and the defense. A crucial theory for the

prosecutor's case was that defendant himself created a figure of $75,000 as the income for George Fried, and that such figure was not a projection of what the income of the business would be upon hiring two employees. This theory was countered by defense testimony that the $75,000 figure was a projection based on conversations with Mr. Fried. To support its theory, the government asserted that in two other applications, in regard to two other businesses, the defendant had also fabricated a $75,000 figure. As to one such other business, the court upon cross-examination of government witness Rao found that the $75,000 was in fact a projection. The court held this was favorable to defendant. (Tr. 986)

The court in order to determine whether the $75,000 figure with regard to George Fried was an honest projection or a fabrication, showed great interest in hearing the testimony of Mr. Rothman, who filed the form as to the other business. (Tr. 676) Although under subpoena, Mr. Rothman did not appear to testify, and the government finally rested in rebuttal without calling him. Immediately thereafter, there were the final arguments. The court recessed for the evening so that he could deliberate prior to any judgment. The court entered the elevator, which contained defendant, his lawyer and Mr. Rothman and others. And then the incident, as described by the judge, occurred. Appendix D, original Petition.

Here, where there had been discussion in open court that possibly Mr. Rothman would desire immunity prior to testifying—implying that Rothman may be guilty of an offense—which would imply defendant's guilt, this incident was so highly prejudicial as to affect the judge's deliberation.

Defendant was denied his right of confrontation as to what the witness may have said to the judge, as well as his right to question the judge's expression in court as to the effect this encounter may have had on him. How could defendant dispute the judge's statement that even though he was present in the elevator, he did not hear the witness' statement! Testimony by a witness in a similar circumstance would subject the witness to extensive cross-examination. Under similar circumstances, even a juror could be examined by defense counsel. *Remmer* v. *United States,* 347 U.S. 929, 98 L.Ed. 654. Limitations on such examination of a juror would be reversible error. *Ibid.* But here, where defendant was on trial before the court and the court had to decide both his guilt and any sentence, it was impossible to expect defendant to cross-examine the court as to (a) what he heard and (b) what effect the incident may have had on his determination of defendant's guilt.[5] See *United States* v. *Vaughan, supra.*

The situation therefore denied defendant his right to trial by an impartial factfinder; here, his right to an impartial trier of fact not prejudiced by private encounters with witnesses was denied.

This Court must grant certiorari to consider this vital issue—whether, where a defendant would have an opportunity to examine even a juror as to prejudice due to an encounter with a witness outside of court, and no opportunity exists when the matter is tried before the court, must a mistrial be granted in order to avoid the defendant's being convicted by a judge prejudiced by such encounter.

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5 The court never asked defendant or his counsel if they desired to question him.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that his Petition for a Writ of Certiorari be granted.

Respectfully submitted,

FREDERICK F. COHN
35 E. Wacker Drive
Chicago, Illinois 60601
Attorney for Petitioner

APPENDIX A

LETTER DATED MAY 26, 1976•

5330 KEYSTONE COURT
ROLLING MEADOWS, ILLINOIS 60008

TEKTRONIX

PHONE: 259-7580
D.D. CODE: 312

May 26, 1976

Two-Way Radio
5041 S. Dorchester
Chicago, Ill. 60615

Attn: Benjamin Fields

Gentlemen:

This is to advise you that the cost of repair for instruments being serviced is based on the cost of parts plus labor at the rate of $28.00/hour.

Sincerely,

Pat Youdelis

Pat Youdelis

068-7844-00 D

• Appellate Counsel is not attempting hereby to improperly supplement the Record; rather, this letter is submitted, as it were, as an "appellate offer of proof," not only as to the propriety of the estimate, but also as to trial counsel's dereliction in failing to adduce comparable evidence below.

APPENDIX B

Defendant's Exhibit D-1

SUBJECT FRIED stated that he had indeed applied for labor certification for several Indians as electrical instrument technicians. He stated that he had met the two through a friend of his, an attorney, named MEHENDRA MEHTA, who had referred the two Indian men to him for employment. He stated that both individuals had come in person to his store and that he had interviewed them for their qualifications and had given them tests to determine whether or not they were qualified electrical instrument repairmen. SUBJECT FRIED was questioned at length concerning the type of work that the Indians would be doing at his establishment and he claimed that the job description, as attached to the Form MA-750B, was correct and that the two Indians for which he had submitted applications for employment certification were fully qualified as to the job description. SUBJECT FRIED was shown photographs of six male Indians, one of which was that of SUBJECT JAYENDRA P. VORA, another was that of SUBJECT ARUNKUMAR M. DAVE, and another was that of SUBJECT MEHENDRA MEHTA. SUBJECT MEHTA's photograph was the only one that he could identify.

APPENDIX B-1

Defendant's Exhibit D-2

SUBJECT FRIED was again interviewed on March 11, 1974 at 1012 Argyle Street, Chicago, Illinois. On this occasion he was able to identify photographs of SUBJECT ARUNKUMAR DAVE and SUBJECT JAYENDRA VORA from a group of other photographs. He showed the writer what appeared to be copies of the Form MA 7-50B, which he had signed, and photographs of SUBJECT ARUNKUMAR DAVE and SUBJECT JAYENDRA VORA, which he said has been provided for him by SUBJECT MEHTA. He still maintained that SUBJECT ARUNKUMAR DAVE and SUBJECT JAYENDRA VORA had come in person to his shop and had been tested as electrical instrument repairmen prior to his signing the form. He admitted that the figure of $75,000 annual sales or income was extremely high for his company and admitted that with his current income he could not afford to pay two electrical instrument repairmen $4.25 an hour for full-time employment. He admitted that the forms had only been partially filled out at the time he signed them and returned them to SUBJECT MEHTA. He executed a short statement at that time, copy of which is attached as Exhibit "D", in which he withdrew his offer of employment to SUBJECT ARUNKUMAR DAVE and SUBJECT JAYENDRA VORA.

APPENDIX C

Tuttle & Kellenberger

[illegible] AVENUE
[illegible]

February 17, 1975

District Director
U. S. Immigration Naturalization Service
219 S. Dearborn Street
Chicago, Illinois 60604

Re: [illegible]

Beneficiary: Patel Jagdishbhai N. A-191-713-275

We have obtained a labor certification from the U. S. Department of Labor for Mr. Patel Jagdishbhai N. for the job of Supervisor (second shift). Mr. Patel Jagdishbhai N. is presently working with us as a Supervisor and we will absorb him into a permanent position as such and will pay him accordingly.

Thanking you,

TUTTLE & KELLENBERGER

John Zolaniak
Chicago Operations Manager

DEFENDANT'S EXHIBIT 61

BEST COPY AVAILABLE

APPENDIX D

Form Approved
Budget Bureau No. 44 R1301

U.S. DEPARTMENT OF LABOR
MANPOWER ADMINISTRATION
MA 7-50B
REPLACES FORM ES-9788

APPLICATION FOR ALIEN EMPLOYMENT CERTIFICATION

JOB OFFER FOR ALIEN EMPLOYMENT

READ THIS NOTICE BEFORE COMPLETING FORM

To knowingly furnish any false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a felony punishable by $10,000 fine or five years in the penitentiary, or both (18 U.S.C. 1001). Any alien, prospective employer or any person acting on behalf of such alien or employer, who knowingly makes any misrepresentation concerning the alien, or his prospective employment including such matters as wages, hours, or the occupation in which an alien will be employed, or any person who falsely represents, in the execution of this form that he is offering the alien employment as the prospective employer of such alien, will be prosecuted to the fullest extent of the law.

IMPORTANT: READ ATTACHED INSTRUCTIONS BEFORE COMPLETING THIS FORM

Print legibly in ink or use a typewriter. If you need more space to answer fully any questions on this form, use a separate sheet. Identify each answer with the number of the corresponding question. Sign and date each sheet.

IN SUPPORT OF THE APPLICATION FOR ADMISSION OF

1. NAME OF ALIEN *If for temporary employment of more than one alien in same occupation, attach list of names and present addresses.* — *Family name in capital letters* | *First name* | *Middle name* | *Maiden name*

2. PRESENT ADDRESS OF ALIEN — *Number and street* | *City and town* | *State & ZIP Code or Province* | *Country*

3. TYPE OF VISA (If in U.S.)

NOTE: Do not employ a nonimmigrant alien who cannot show authorization to work stamped or endorsed on his form I-94, Arrival and Departure Record. Contact Immigration and Naturalization Service if in doubt. An alien who works without authorization is subject to deportation and his employer is subject to denial of certification.

THE FOLLOWING INFORMATION IS SUBMITTED AS EVIDENCE OF AN OFFER OF EMPLOYMENT

4. NAME OF EMPLOYER *(Full name of organization)*

5. TELEPHONE *(Area code and number)*

6. ADDRESS — *Number and street* | *City or town* | *County* | *State* | *ZIP Code*

7. ADDRESS WHERE ALIEN WILL WORK *(If different from item 6)*

8. SIZE OF ORGANIZATION — ANNUAL SALES OR INCOME $ | TOTAL NO. OF EMPLOYEES

9. BRIEF NONTECHNICAL DESCRIPTION OF THE NATURE OF EMPLOYER'S BUSINESS OR ACTIVITY

10. NO. OF EMPLOYEES WHO PERFORM SAME WORK AS ALIEN

11. NO OF EMPLOYEES AT PLACE WHERE ALIEN WILL WORK

12. IF SEASONAL JOB, ENTER MONTHS THAT JOB STARTS & ENDS — FROM | TO

Complete items 13 and 14 only if job is temporary

13. EXACT DATES YOU EXPECT TO EMPLOY ALIEN(S) — FROM | TO

14. NO. OF OPENINGS TO BE FILLED BY ALIENS UNDER THIS JOB OFFER

15. WOULD YOU HIRE A QUALIFIED U.S. WORKER IF AVAILABLE? ☐ YES ☐ NO

16. DESCRIBE EFFORTS YOU HAVE MADE TO FILL THE JOB

17. DESCRIBE HOW YOU LEARNED THAT ALIEN NAMED ABOVE WAS AVAILABLE

18. ALIEN NAMED ABOVE EMPLOYED BY ME — ☐ CURRENTLY — DATE STARTED; ☐ PREVIOUSLY — DATE LEFT *(If any)*

PREVIOUS CERTIFICATIONS RECEIVED *(Permanent job offers only)*

19. NO. CERTIFICATIONS RECEIVED | DATE OF MOST RECENT | 20. NO. ALIENS HIRED | NO. STILL ON JOB

ENDORSEMENTS

Make no entry in this section—for government agency use only

21. DATE FORMS ARE RECEIVED AS ACCEPTABLE FOR PROCESSING

L.O. | S.O.

R.O. | N.O.

For Local ES Office Use Only
L.O. ADDRESS

22. IND. CODE | 23. OCC. TITLE | 24. OCC. CODE

Items continued on reverse

Apr. 1970

29. NAME OF JOB OFFERED			30. IS THERE EITHER A LABOR DISPUTE EXISTING OR A LABOR CONTRACT BEING NEGOTIATED? ☐ YES ☐ NO
27. IF THE JOB IS UNIONIZED ▶	NUMBER OF LOCAL	NAME	CITY AND STATE

28. TOTAL HOURS PER WEEK		29. RATE OF PAY *(Per hour, week, etc.)*		ADDITIONS TO BASIC RATE OF PAY *(Commission, piece rate, etc.)*
BASIC	OVERTIME	BASIC $ PER	OVERTIME $ PER	

30. DESCRIBE FULLY THE JOB TO BE PERFORMED *(If alien is required to live at work, form MA 7-50C must also be submitted.)*

DUTIES

EQUIPMENT OPERATED	WORKING CONDITIONS

31. STATE IN DETAIL THE *MINIMUM* REQUIREMENTS FOR WORKER TO PERFORM SATISFACTORILY THE JOB DUTIES DESCRIBED ABOVE.

EDUCATION *(Enter number of years)*			SPECIFY COLLEGE DEGREE REQUIRED	MAJOR FIELD OF STUDY
GRADE SCHOOL	HIGH SCHOOL	COLLEGE		
TRAINING ▶	NUMBER OF YEARS OR MONTHS		TYPE OF TRAINING *(Specify vocational preparation, such as apprenticeship, trade school or other training required)*	
EXPERIENCE ▶	NUMBER OF YEARS OR MONTHS IN JOB BEING OFFERED, OR		NUMBER OF YEARS OR MONTHS IN RELATED OCCUPATION	RELATED OCCUPATION *(Specify)*

32. SPECIFY ANY OTHER SPECIAL REQUIREMENTS

33. OCCUPATIONAL TITLE OF PERSON WHO WILL BE ALIEN'S IMMEDIATE SUPERVISOR	34. TYPE AND DEGREE OF SUPERVISION ALIEN WILL RECEIVE	35. NUMBER OF OTHER EMPLOYEES ALIEN WILL SUPERVISE

36. HAVE YOU FULLY INFORMED ALIEN OF JOB DUTIES, RATE OF PAY, AND TERMS OF YOUR JOB OFFER? ☐ YES ☐ NO

37. DECLARATIONS

DECLARATION OF EMPLOYER: Under penalties of perjury, I declare that I have examined this application, supplements thereto, and all accompanying documents, and to the best of my knowledge and belief the information presented thereon is true, correct and complete.

SIGNATURE	DATE SIGNED

NAME *(Type or print)*	TITLE

DECLARATION OF AGENT OF EMPLOYER *(If prepared by, or if assistance in preparation is provided by person other than employer):* I declare that the contents of this application, supplements thereto, and all accompanying documents are based on all information of which I have any knowledge.

SIGNATURE	DATE SIGNED

NAME *(Type or print)*

ADDRESS *(Number and Street, City, State and ZIP Code)*

INSTRUCTIONS FOR COMPLETION OF FORM MA 7-50B

(Replaces Instruction Form ES-576B)

A. GENERAL INFORMATION

1. This form is required whenever an employer in the United States seeks to employ an alien *unless the alien possesses occupational qualifications for which a job offer is not required.* Information about occupations which do not require job offers may be obtained from offices of the State employment service, the Immigration and Naturalization Service, or U.S. Consulates abroad.
2. If an offer of *permanent* employment is made to an alien seeking admission as an *immigrant*, Form MA 7-50A, Statement of Qualifications of Alien, must also be submitted with this Form MA 7-50B. *Temporary* employment offers to *nonimmigrant* aliens require only this Form MA 7-50B. Employers seeking more detailed information regarding requirements and procedures for obtaining Department of Labor certification should contact the office of the State employment service which serves the area of proposed employment.

   Important: If the worker will be required to live at the place of employment, a Form MA 7-50C, Supplemental Statement for Live-at-Work Job Offers, must be filled out and submitted by the employer together with Forms MA 7-50A and B.
3. The requirements for filing a preference petition are under the jurisdiction of the Immigration and Naturalization Service. Petition forms and filing instructions may be obtained from offices of that Service.

   NOTE: Aliens in the United States should contact the Immigration and Naturalization Service to determine whether or not they are eligible for admission without a job offer.

B. INSTRUCTIONS FOR NUMBERED ITEMS requiring explanation are as follows:

Item 1. Enter the name of the alien to whom the job offer is being made, exactly as it appears on Form MA 7-50A, Statement of Qualifications of Alien. If temporary employment of more than one alien is being offered, attach a list of the names and present addresses of the aliens.

Item 2. Enter the present address of the alien, whether within or outside of the United States.

Item 3. If the alien is presently in the U.S., enter the number and type of visa held; e.g., B-2 (Visitor), F-1 (Student), etc. If nonimmigrant status has been changed since entering U.S., indicate current status as shown on Form I-94.

Item 4. Enter full, legal name of business, firm, or organization, or if an individual, enter name ordinarily used for legal purposes on documents.

Item 7. If the alien will work at a site or location different from that shown in item 6, enter the number and street, city, State, and zip code where the alien will work.

Item 8. No entry for annual sales o. income is required in this item if the employer is an educational institution, hospital, church, non-profit organization, private household, or other non-business establishment. Business firms, companies, and organizations, including farms, ranches, and other agricultural enterprises, should enter the total number of employees in the entire firm or organization (total work force of all locations combined).

Item 9. If a private home, enter "Household." Farms, ranches, etc. must include the number of acres and number of each type of livestock raised in their description of activities.

Item 10. Enter the number of employees who presently work in the same job or occupational category in which the alien will work at the employing address.

Item 11. Give the number of employees (total work force) who work at the place or location where the alien will be employed. Enter "Same as No. 8" if the employer has only one location.

Item 12. If the alien will be required to work on a seasonal basis (only part of every year), enter the months the job starts and ends; e.g., From: March To: October. If not seasonal job, leave item blank.

Items 13 and 14 are to be completed *only* if the job offer is temporary.

Item 13. Enter the exact month, day, and year the temporary job starts and ends; e.g., from March 15, 1970 to June 30, 1970.

Item 14. Enter the number of openings to be filled by *aliens* t. whom this job offer for temporary employment is made.

Item 16. Efforts to be identified include recruitment and training programs, advertising, etc. and the results of such efforts.

Item 18. Complete only if you have employed alien.

Items 19 and 20 are to be completed *only* if the job offer is permanent.

Item 29. Enter common name or payroll title of job being offered to the alien.

Item 29. Examples of required entries are: $2.50 per hour or $450 per month. Commissons, price rates, and other additions to the basic pay rate must be expressed in terms such as 40 percent of gross sales, $.03 per unit, etc. If no basic, minimum, or guaranteed dollar amount is involved (as in the case of straight commission only) the employer must (1) give details of the method of computing the compensation, and (2) provide an estimate of the average dollar amount per month or year to be paid to the alien or which is currently being paid to other employees in similar jobs. Use space in item 30 or a separate sheet to provide this information. Be sure to include the word "estimated" with the dollar amount.

Item 30. Describe all job duties in detail as you expect them to be performed by *any* worker filling the job opening. Do *not* include restrictive specifications unrelated to actually doing the job which would prevent consideration of otherwise qualified workers. In addition, enter the equipment, machines, etc. to be operated and the working conditions of the job, such as ventilation, heating, etc.

Item 31. Specify, as indicated, the *minimum* education, training, and experience which are required for a worker to perform satisfactorily on the job. Requirements must not be tailored to fit the alien only.

Item 32. Examples of other special requirements are ability to speak, read, and write foreign languages only if definitely job-related, requirements for licensing, etc.

Item 37. All copies of this form must bear the original signatures of all parties involved, as applicable, and the dates signed. When no agent of the employer is involved, the employer must sign and date all copies. If the employer is a company, firm or organization, the official title of the person who signs and dates the form is also required. If an agent of the employer signs, dates, and otherwise completes the "Declaration of Agent of Employer" portion, no signature of the employer is required. An agent acting on behalf of the employer must sign, date and complete the designated spaces in this item, regardless of whether or not the employer signs the form.

C. WHERE TO FILE. Required forms involving job offers for either temporary or permanent employment of aliens must be filed at the office of the State employment service which serves the area where the job is located. The original and one copy of each form are the *minimum* number required. (Do *not* submit forms directly to the Department of Labor.)

D. NOTIFICATION OF APPROVAL OR DISAPPROVAL. Employers will be notified by the Department of Labor if an application for alien employment certification is approved or disapproved, and instructions for further action will be issued. Employers may then inform the alien regarding the certification.

E. CERTIFICATION VALIDITY. If approved, certification pursuant to Department of Labor regulations is valid for a minimum period of one year and for an indefinite period thereafter, unless the occupation is specified by the Department of Labor as one requiring revalidation. Approval of job offer cases is recorded on MA Form 7-50B only. If disapproved, no record is made on the forms.

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
219 South Dearborn Street
Chicago, Illinois 60604

Refer To This File No.
A20 911 800 TC-345

Date: 13 JUN 1977

Yogendra B. PATEL
4949 North Whipple #2W
Chicago, Illinois 60625

DECISION ON APPLICATION FOR STATUS AS PERMANENT RESIDENT

Upon consideration, it is ordered that your application for status as a permanent resident be denied for the following reasons:

(SEE ATTACHMENT)

You are granted to JUL 13 1977 to effect your departure from the United States voluntarily, without the institution of proceedings to enforce your departure. You must notify this office before that date on the enclosed card (Form I-438) of the arrangements you have made to depart from the United States. *At the time of your departure from the United States, do not fail to surrender Form I-94, Arrival-Departure Record, in accordance with the instructions on that form.*

If you fail to depart from the United States by the date specified, proceedings will be instituted to enforce your departure. You may renew your application for status as a permanent resident during such proceedings.

Sincerely yours,
David V. Vandersall
David V. Vandersall
District Director

Enclosure(s)
☒ I-438
☐ I-94
☐ Passport
☐

Form I-291
(Rev. 11-30-72)N

GPO 894-865

ATTACHMENT TO I-291 A20 911 800

On February 24, 1976, you applied for adjustment of status to that of a lawful permanent resident of the United States under the provisions of Section 245 of the Immigration and Nationality Act, as amended, as a person to whom a nonpreference visa number is immediately available. You have based this application upon your qualifications to fill the position of "Electrical Design Engineer", a position which the Secretary of Labor has certified will not adversely affect the wages and working conditions of United States citizens and lawful permanent residents engaged in simular employment.

Your record indicates that you were employed full time by the William Bowman Rubber Company, Cicero Berwyn, Illinois from May of 1973 to September 1973. From November of 1973 to July 1975 you were employed on a full time basis by the Racine Paper Box Company, Chicago, Illinois.

You last entered the United States on September 27, 1974 as a nonimmigrant student. A nonimmigrant student is statutorily prohibited from accepting employment without securing permission from the Immigration Service. To accept employment without permission violates the student status and may be cause for deportation proceedings to be initiated. Your record reflects that you resumed your employment with the Racine Paper Box Company after your last entry into the United States. It must be assumed, therefore, that not only were you returning to the United States to continue your studies but you were also returning to continue your illegal employment. Since you were not in possession of a valid labor certification as required by Section 212(a)(14) of the Act, you were not admissible to the United States at the time of your last entry.

You became employed on a full time basis with Sommer Electric Company Inc., Elk Grove Village, Illinois in August of 1975 and are still so employed. On January 28, 1975 and on August 28, 1975 you signed and submitted forms I-538 (Application of Nonimmigrant Student for Extension of Stay, School Transfer or Permission to Accept or Continue Employment) to this Service. On both applications you falsely indicated that you had not been employed in the United States. In the January 28, 1975 application you requested employment and were specifically denied permission to accept employment. On the basis of your false statements you have twice received extensions of stay to which you were not entitled.

As the foregoing evidence clearly points out, your record before this Service is that of a person who has failed to demonstrate even perfunctory good faith toward the laws of this country and the regulations of this Service. You have violated the terms of your admission to the United States by accepting illegal employment. You have deliberately concealed such employment from this Service and thereby obtained benefits under the Immigration laws to which you were not entitled.

Section 245 of the Act provides in pertinent part:

> The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence. (emphasis added).....

You have failed to establish that the facts of your case merit the favorable exercise of administrative discretion. Your application for adjustment of status to that of a lawful permanent resident of the United States is, therefore, denied.

APPENDIX F

List of Documents Probably in Existence

As to Vora Jayendra.

Application for Visa for applying F.1 visa together with accompanying documents.

Application of Vora for bringing his wife as F.2 together with any documents submitted by him.

Application Form I-538 for change of school from Los Angeles to Chicago, together with accompanying documents.

Application for extension of time to stay in this country for each year together with accompanying documents.

Application for adjustment of status filed by Vora other than dated October 9, 1973, sent for consideration after obtaining Labor Certification under Sec. 212(a)(14) in relation to his job with Rehnsberg Jacobson Mfg. Co.

Biographic Information form G.325.

Any other application made by Mr. Vora in relation to his status into U.S. to the Department of Justice, made by him or through his lawyer up to the trial date, more particularly of requesting permission to go to India.

As to Dave Arunkumar.

Application for Visa for applying F.1 visa together with accompanying documents.

Application of Dave A. for bringing his wife as F.2 together with any documents submitted by him.

Application Form I-538 for extension of time to stay in this country for each year together with accompanying documents.

Application for adjustment of status filed by Dave A. other than dated January 22, 1974, sent for consideration after obtaining Labor Certification under Sec. 212(a)(14) in relation to his job with Avildon Tools.

Biographic Information form G.325.

Any other application made by Mr. Dave A. in relation to his status into U.S. to the Department of Justice, made by him through his lawyer up to the trial date.

As to Dave Dinesh.

Application for Visa for applying F.1 visa together with accompanying documents.

Application of Dave Dinesh for bringing his wife as F.2 together with any documents submitted by him.

Application Form I-538 for change of school if any together with accompanying documents.

Application for extension of time to stay in this country for each year together with accompanying documents.

Application for adjustment of status filed by Dave Dinesh, sent for consideration after obtaining Labor Certification under Sec. 212(a)(14) in relation to his job (at that time).

Biographic information form G.325.

Any other application made by Dave Dinesh in relation to his status into U.S. to the Department of Justice, made by him or through his lawyer.